No. 92-519

IN THE

# Supreme Court of the United States

October Term, 1992

T.K. WETHERELL, Speaker of the Florida House of Representatives, PETER R.WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

*Appellants,*

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

*Appellees.*

**On Appeal from the United States District Court for the Northern District of Florida**

## MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND COMMUNITY RELATIONS COMMITTEE OF THE GREATER MIAMI JEWISH FEDERATION IN SUPPORT OF APPELLANTS


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## QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. When determining minority voting strength under the test of *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of non-citizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that

a substantial percentage of the plaintiff class are not citizens?

3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding?

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## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

*Amici* American Jewish Congress and the Greater Miami Jewish Federation move for leave to file this brief in support of appellants. The DeGrandy appellees refused to consent to the filing of this brief, making this motion necessary.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the political, civil and economic rights of American Jews and all Americans. To this end, it has long supported legislation and judicial action to eliminate discrimination in the franchise. As early as the 1940's, it supported federal legislation to eliminate discrimination in voting.

The Community Relations Committee (CRC) of the Greater Miami Jewish Federation is the advocate for the

individuals, dealing only with the Jewish community as a whole. N.W. Cohen, Jews in Christian America, pp. 3-36 (1992).

The interest of the *Amici* in this case is not one merely of adherence to an historically important principle. The issues raised have practical consequences for the Jewish community, which for complex demographic and historical reasons is particularly likely to live in close proximity to minority groups. Starting with the redistricting challenged in *United Jewish Organizations of Williamsburgh* v. *Carey*, 430 U.S. 144 (1975), through last year's New York City redistricting, to redistricting this year in California, and now this case, Jewish communities which are physically compact, cohesive and which would ordinarily find themselves in one district, find themselves deliberately split asunder in the pursuit of majority-minority

survival and security of the Jewish community both at home and abroad. Through a broad coordinated program of activity, the CRC gives high priority to protecting democratic constraints, particular the Bill of Rights; and fostering a plural democratic society in the United States. Founded in 1973, the CRC is committed to the values of Jewish tradition and the American democratic heritage.

*Amici* have also steadfastly opposed efforts to transform the attack on invidious racial discrimination from an anti-discrimination principle into a system of proportional representation. It believes legislators represent people, not groups. This is an idea with deep resonance for American Jews. It served as a magnet for European Jewry, still bearing the scars of centuries in which European governments refused to acknowledge Jews as

the pursuit of majority-minority districts.

Jews make no claim to proportional or group representation. Demographic changes, shifting political alliances, among other causes, give no one and no group, including Jews, any right to rely on a particular districting configuration. But it is one thing to say that a group must take its chances in the districting process. It is quite another to say, as the District Court did here, that some groups have rights as groups and that others do not; indeed that some groups may be rendered politically impotent to further the interests of other groups.

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## STATEMENT OF THE CASE AND FACTS

The *Amici* adopts the Appellant's statement of the case and statement of the facts.

## INTRODUCTION

Redistricting is a zero-sum game. When legislative power is allocated to enhance the political power of some group, there is a necessary and concomitant decrease in the political power of some other group. Enfranchising minorities necessarily dilutes the power that majority groups previously enjoyed. Where those majority groups wielded power as a result of illicit oppression of racial and ethnic minorities, there is nothing untoward about the forced redistribution of political power. It was to further this end that the Voting Rights Act was enacted.

This case poses the different question of whether the Voting Rights Act ("VRA") requires an artificial enhancement of the political power of a group now a potent participant in the political process. Necessarily that enhancement comes at the expense of other groups or classes. These groupings, which are not minorities within the purview of the Voting Rights Act as it is ordinarily understood, may be as important to their members as race or ethincity are to members of racial minorities.

Ours is a society composed of a bewildering array of groups. Racial and language minority groupings are but one type of group, and they enjoy special status under the VRA.[1] But there are many

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1. To the best of our knowledge, no appellate court has passed on the question of whether non-minorities are protected by the VRA, and how the Act should be interpreted in regard to claims by whites of vote dilution.

other groups in our society. Religious groups are obvious examples. Substantial scholarship demonstrates that religious affiliations have a direct correlation with voting patterns. L.A. Kellstedt & M. A. Noll, Voting For President and Party Identification in Religion and American Politics: From the Colonial Period to the 1980's (ed. M.A. Noll) at 355 (1990); A Greeley, Religious Change In America, pp. 76-86 (1989). People of a common national origin, even if English is now the primary language of the group, are yet another example of politically meaningful groups. The Irish, Japanese-American and Polish communities are other prominent examples of this type of social and political group.

The relevant groupings are not only cast in immutable (or relatively immutable) terms such as race, religion, or

national origin. Republicans and Democrats are perhaps the most obvious example of groups sharing political interests in common. *Cf. Davis* v. *Bandemer*, 478 U.S. 109 (1986). Economic interests, accidents of geography, guild or professional interests (*e.g.*, unions, small business owners, farmers and the like) bring people together into voting blocks or communities of interest, typically with distinct demographic stratification resulting in residential patterns which can be taken into account in the districting process. Redistricting traditionally has taken these interests into account.

Even among racial minorities, political interests do not always coincide merely because groups share a common racial heritage or language, as the record in this case illustrates. The District Court found that the interests of African

Americans and Hispanics clash in a variety of ways, leading to shifting alliances with whites. Such clashes, moreover are not unique to Dade County, Florida. *See* J. Miles, *Blacks vs Browns*, The Atlantic (October, 1992) at 41-68; *Black and Hispanic Groups Battle Over Schools Post in Los Angeles*, New York Times (October 5, 1992) A-14, col 4.

Elsewhere, there are substantial differences between blacks of different origins. New York's racial mix is made more complex by rivalries between 'American' blacks and 'Caribbean' blacks. These differences suggest that factors other than race are at work in forming, nourishing and sustaining sociologically and politically significant communities.

Dade County, like many other urban areas, is composed of a complex mix of groups. In redistricting Dade county, the

Florida legislature attempted not only to comply with the twin mandates of one person, one vote and the VRA's requirement that minority groups have effective political voice, but to grant voice and representation to other social, economic, geographic and political groupings.

The judgment below, however, focused on the interests of only one such group (or, at best, two). Applying the *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) test developed to assess the legality of multi-member districts to this single-member districting case, the District Court found that Hispanic power could be enhanced by the wizardry of computer-drawn lines beyond the number of districts created by the legislature's plan. The District Court put into a place a substitute districting plan devised by the Appellees which maximized Hispanic

political power beyond its proportion in the electorate.[2]

What the District Court failed to recognize -- indeed did not even mention -- is that this maximization of Hispanic power came at the direct expense of other groups, including, in this case, a large and cohesive Jewish community in the North Miami Beach and Hallandale areas, which was divided under the District Court's plan in order to create one of the two additional Hispanic seats. By contrast, the Legislature had preserved this group's cohesiveness by placing it in one legislative district.

The price paid by other groups, moreover, is not simply that they will be marginally less politically powerful.

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2. As Appellants note in their Jurisdictional Statement [21-25], there is a substantial question about how to measure ideal or natural minority strength in this case.

Because by the District Court's hypothesis the Dade County area is racially polarized, the groups intentionally sacrificed to maximize minority political power will be submerged in new majority-minority districts where they will be politically ineffectual and voiceless precisely because they are not Hispanic. Those campaigning for office in majority-minority districts have no incentive to appeal to non-minoroity voters; indeed, it is likely to be politically dangerous for them to do so.

So long as *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) and *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977)[3] (hereafter "*UJO*") remain good law,

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3. AJCongress filed an *amicus* brief in support of the United Jewish Organizations. We there quoted with approval the prophetic dissenting opinion of Judge (Marvin E.) Frankel in that case:

(continued...)

some of this submergence of whites in minority districts is the inevitable result of the Voting Rights Act.

*UJO* in part rests on what we believe to be an erroneous sociological

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3.(...continued)
There are unbearable and absurd implications in the notion of 'proportionality' between racial or ethnic *population* percentages and percentages of *districts* controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65% white and 45% 'nonwhite', Kings County has 10.7% Italian immigrants or people with at least one parent who immigrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9% plus unknown additional Russian, 35% Puerto Rican, 1.7% recently from Austria, 1.7% recently from Ireland (plus many more of Irish ancestry), 30.3% Jewish, 2.2% 'other' religions, 1.3% recent German immigrants, plus a dizzying mass of others 'whose lineage is so diverse as to defy ethnic labels.' How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.! The short answer is, of course, that we don't. But the apparent 'test' in today's majority opinion (31.4% nonwhite districts a 'good' figure because less than the 35.1% nonwhite Kings County population) implies that perhaps we should.

510 F.2d 512, 533 (S.D.N.Y. 1975) (Frankel, J., dissenting), *aff'd*, 430 U.S. 144 (1977). (citations omitted)

assumption -- that whites are fungible, that they share an overriding comity of interests merely because of the happenstance of their skin color, and that whites in one place who are submerged in a minority district will be vicariously represented by whites elsewhere who dominate a different district. *Compare* 430 U.S. at 165-66; *id.* at 178 (Brennan, J., concurring); *id.* at 195 (Burger, C.J., dissenting).

It is simply not the case, of course, that elderly Jews in North Miami Beach or Hallandale, many of whom are transplanted northerners, share much in common with native-born non-Jewish whites from northern Florida, unless the unstated assumption is that these groups should and will resist all the political initiatives of Blacks and Hispanics.

*UJO* presents the mirror image of this case. There the question was whether the state could use racial criteria in districting to avoid a regression of minority political power. The question here is whether it must use such criteria to artificially enhance that power.

The Florida legislature did not evade the command of the Voting Rights Act that Hispanic voters enjoy effective political power. Approximately half of Dade County's residents are Hispanic. Under the the Florida Legislature's rejected plan, half (9 of 18) of Dade County's Florida House of Representatives seats were configured so that Hispanics could select a candidates of their choice, which for the District Court appears to have meant the election of Hispanics.

The differences between the Legislature's plan and that of the

District Court are stark. The Legislature's plan took into account not only the interests of Hispanics, but those of other political, ethnic, class and geographic interests. Appellee's plan subordinated all interests to the enhancement of Hispanic political power. The District Court believed that the VRA required the latter course, and without even pausing to consider interests other than those of African Americans, ordered the Appellee's plan into effect.

The view that fuels these results is that the VRA requires the marshalling of the political strength of minorities to the exclusion of all else but the one person, one vote rule. The assumption underpinning the District Court's interpretation of the VRA Amendments of 1982 is that race and ethnicity are the central organizing features of American

political life -- not class, not geography, not ideology and not any other shared value, common goal or economic interest.

That interpretation of the Act gives weight to only one of Congress' purposes in adopting the 1982 Amendment to the VRA. But there was another purpose -- avoiding an interpretation of the Act which supported claims of proportional representation. This Court should note probable jurisdiction in this case to give plenary consideration to the proper balance between these two purposes.

This view of the VRA adopted by the District Court is, we submit, inconsistent with the language of the statute, congressional intent and the decisions of this Court. It is a view which has nevertheless gained wide currency among those charged with redistricting, if only

to avoid politically painful and financially costly litigation, the obloquy of being accused of racism or, as some have charged, an attempt to cynically enhance their own political power by packing minorities into one district and creating safe all-white districts elsewhere.[4]

## I. THIS CASE PRESENTS IMPORTANT QUESTIONS UNDER THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT

The most important issue before the Court is precisely what standard should be applied to measure challenges to single-

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4. *See Democrats Court Minorities To Counter GOP's Pitch*, Congressional Quarterly (May 4, 1991) at 1103; *Racial Gerrymandering*, New York Times (July 16, 1991), at p. A.18, col.1; *Letter from J. R. Dunne, Assistant Attorney General for Civil Rights to Judith Reed, Esq., dated July 19, 1991* (withholding preclearance from New York city council redistricting); *Brown Says Uncertainty of Jewish Vote Dictated Drawing of District*, Los Angeles Times (September 20, 1992), at p. A.3, col.1.

member districts under the 1982 Amendments to the Voting Rights Act, an issue explicitly left open by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 46, n.12 (1986), the Court's only essay to date interpreting the crucial 1982 Amendments. It is an issue that, as Appellants note, has badly divided the lower courts. *See* Jurisdictional Statement at 14-19.

a. The History of the 1982 Amendments

The 1982 Amendments overruled *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), holding that the Voting Rights Act was not violated absent an intent to discriminate. In *Bolden*, a plurality of this Court reasoned that an effects test would be tantamount to requiring proportional representation. The plurality rejected a suggestion by Justice Marshall that those groups which had historically been fenced

out of the political process had a constitutional and statutory right to be represented as groups in the legislature. *Compare* 446 U.S. at 75-80 (plurality opinion of Justice Stewart) with *id.* at 120-24 (dissenting opinion of Justice Marshall).

When other sections of the Voting Rights Act came up for renewal in 1982, notably the preclearance provisions of Section 5 of the Act, there was a broad consensus in the Congress that the decision in *Bolden* made it too difficult to prove a violation of the Act under § 2, in part because *Bolden* was understood to require "smoking gun evidence" of an intent to discriminate. *Cf. Rodgers* v. *Lodge*, 458 U.S. 613 (1982). Many felt that it was unfair to require plaintiffs

to produce such evidence about events that might have occurred decades earlier.[5]

There was, however, consensus about how to remedy the problem *Bolden* was thought to create. Some simply wanted to adopt a straightforward effects test, said to have been the law as laid down in this Court's decision in *White* v. *Register*, 412 U.S. 755 (1973) and a series of decisions from the former Fifth Circuit, including most prominently, *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Opponents of amending § 2 in this way argued that an effects test was tantamount to a requirement of proportional representation.

The House of Representatives simply adopted an effects test. *See* House Judiciary Committee, H.R. Rep. No. 97-

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5. For a detailed history of the enactment of the 1982 Amendments, see A. Thernstrom, Whose Vote Counts? (1987).

2227, 97th Congress, 1st Session (1981). The Subcommittee on the Constitution of the Senate Judiciary Committee refused to go along, adopting instead a version of the Act which did not make any change in § 2, leaving intact the intent test of *City of Mobile* v. *Bolden*.

The full Senate Judiciary Committee produced a modified version of § 2 which struck a compromise between the two extreme positions. It explained its provisions in a lengthy report. This compromise version incorporated a modified effects test based largely, if loosely, on *White* v. *Register*, *supra*, but containing an explicit disavowel of any interpretation of the Act which called for finding a violation merely because of an absence of proportional representation. It is this compromise which is embodied in § 2, 42 U.S.C. § 1973.

A key theme running through the Committee report -- which this Court found to be authoritative in *Thornburg* v. *Gingles*, *supra*, 478 U.S. at 43, n.7 -- is that § 2 charges courts with determining not whether a given practice has the effect of denying proportional representation, but whether it "exclu[des] from access to the political process" any racial or ethnic group. S. Rep. 97-417, 97th Cong. 2d Sess. at 33 (1982), reprinted at 1982 U.S. Code, Cong. and Admin. News at 211 (hereafter "S.Rep.").

To that end, the Committee set forth a list of typical factors (which was not to be considered exhaustive) that the courts were to apply in assessing claims that a practice violated the Act:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to

register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. at 28-29, 1982 U.S. Code Cong. & Admin. News at 206-07.

Without more, it is obvious that Congress imposed on the courts a duty far more searching, far more subjective and far more fact specific than a mechanical inquiry into how many majority-minority districts exist, or whether minorities are elected to the legislature to represent

minority populations. What the Congress commanded was a realistic assessment of whether the political process was open to all, or whether racist barriers to full, fair and equal participation in the political process existed.

In keeping with its insistence that an effects test was not the equivalent of a requirement of proportionality, the Committee emphasized the court's obligation to engage in a searching review of all of these factors, and not apply just a mechanical, largely numerical, approach. The statutory disclaimer of any intent to create a right to proportional representation requires at least this much of a limitation on a pure effects approach.

b. The Issues Presented Are Not Resolved by *Thornburg v. Gingles*

The bare fact that this case provides an opportunity to determine a standard for applying § 2 to single-member districts, a question reserved in *Thornburg* v. *Gingles*, is alone sufficient to warrant plenary review. Structural factors of the multi-member district make it uniquely vulnerable to abuse as a means of oppressing minorities. The strongly majoritarian feature of the multi-member district tends to multiply the natural numerical advantage the majority already enjoys.

That advantage, by itself, is not illegitimate. S.Rep. at 33, 1982 U.S. Code, Cong. and Admin. News at 211. But when coupled with evidence that the super-majoritarian effect of multi-member districts has distinct racial overtones

not otherwise justifiable by an important state policy, the VRA requires a moderation of the super-majoritarian effect in the interest of assuring minorities access to political power. The *Thornburg* v. *Gingles* inquiry makes sense in this context.

A single-member district, however, has no extraordinary majoritarian effect. In such a district it is the natural operation of the democratic processes which leads the majority to win, and the minority to lose, elections. That result is not undemocratic. On the contrary, it is the essence of democracy. Of course, if lines are intentionally drawn to deny minorities access to power, the courts are under an obligation to intervene, for no governmental act motivated by invidious racial animus is valid, either under the Voting Rights Act or the Constitution.

*Hunter* v. *Underwood*, 471 U.S. 222 (1985); *City of Mobile* v. *Bolden*, *supra*; *Gomilion* v. *Lightfoot*, 364 U.S. 339 (1960).

The Section 2 effects test concededly applies to single-member districts. It concededly limits the leguslature's freedom to redistrict as it see fit beyond those restrictions imposed by the Constitution. However, the answer to the question of how it applies to single-member districts does not flow self-evidently from the manner in which it is applied in multi-member districts.

Perhaps an entire jurisdiction (*e.g.* ought to be treated as one large multi-member district, making the *Thornburg* v. *Gingles* methodology relevant in single-member districts redistricting cases as well, but that is not self-evident. In any event, the lower courts are divided on this question, *see* Appellant's

Jurisdictional Statement at 14-19, and this Court is the appropriate forum to authoritatively decide it.

c. The District Court Misapplied the *Thornburg* v. *Gingles* Analysis

Even if *Thornburg* v. *Gingles* provides a rule for decision in a case such as this, it does not follow that the District Court properly applied that rule to this case. We do not repeat all of the points made in the Jurisdictional Statement. Several key points, however, do bear emphasis.

The question of what population figures are relevant, as well as the question of whether the District Court erred in not allowing time for those who would be affected by its remedial plan to submit objectives and alternatives, are both significant issues likely to recur in

VRA cases and hence merit this Court's review. The importance of the first is obvious, and is illustrated by the facts of this case. Because many Hispanic residents of Dade County are not yet citizens, and hence not eligible to vote, it is particularly unclear how to determine whether Hispanic electoral power in Dade County is diluted.

The importance of the second question lies with the fact that, as we noted at the beginning of this brief, redistricting is a zero sum game. One cannot grant one group more power or control of more legislative districts without hurting other groups. By collapsing the question of violation and remedy into one, the District Court avoided considering whether the remedy it imposed unnecessarily trammeled the interests of other groups. Other groups may not have any interest in

the court's consideration of whether a jurisdiction has violated the plaintiff's rights, but they unavoidably do have an interest in the remedy. *See Martin* v. *Wilks*, 490 U.S. 755 (1989); *Firefighters* v. *Cleveland*, 478 U.S. 501 (1980).

In our view, however, as important as these issues are, they are not the central vice of the District Court's judgment. Of the various factors listed by the Senate Judiciary Committee report -- a list the Committee emphasized was not exhaustive -- the District Court relied almost exclusively on three factors highlighted in *Thornburg* v. *Gingles* [28a-30a]. What these three factors have in common is that they emphasize the importance of the creation of majority-minority districts as the acid test of compliance with the Voting Rights Act.

The three factors singled out were the size of the minority population, its geographic compactness and its political cohesiveness. The District Court pared down the Senate Committee list, limiting its analysis to those factors which focussed on the number of Hispanic dominated districts. The Court did not undertake the searching analysis of the availability to Dade County Hispanics of other forms of effective access to the political process. Surely, though, it is possible to be politically effective, even dominating, without constituting a majority of any particular district. The National Rifle Association is a conspicious example.

In taking this statistical shortcut, the District Court substituted what amounted to a thinly-veiled, if objective, proportionality analysis for the more

searching, albeit more subjective, test of political effectiveness which the Congress mandated in adopting the 1982 Amendments.

The District Court's treatment of the last factor in its truncated analysis -- political cohesiveness -- is particularly telling of its vision of minority dominated districts as the test of compliance with the Voting Rights Act.

There was no finding that the various Hispanic subgroups shared a common agenda on the issues which were determinative of votes for members of the Florida House [45a]. There was evidence of substantial disparities between the various subgroups comprising Dade County's Hispanic population. To be sure, there was also contrary testimony that Hispanic groups share common viewpoints on several important issues [46a-47a].

The District Court concluded, without weighing these competing political facts of life, that there were sufficient common interests to satisfy the *Gingles* test [47a].[6] What that might be other than the bare fact of a common language is left unclear and unstated.

Of the remaining factors listed by the Senate Committee, the District Court mentioned only the existence of discrimination. With respect to Hispanics, the court pointed only to

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6. There was also testimony (which the District Court relied on) that despite the fact that Puerto Ricans and Cubans do not share a common party affiliation, they were cohesive because Hispanic Democrats (*i.e.* Puerto Ricans) will vote for Hispanic Republicans (*i.e.* Cubans) over an 'Anglo' candidate [47a]. Contrary to what the District Court believed, this testimony does not prove political cohesiveness. Instead it proves mere racial or ethnic cohesiveness. These cannot be the same thing if Congress' disclaimer of any interest in enacting a principle of proportional representation is to be given any weight. That the trial court conflated the two is indicative of that Court's fundamentally flawed approach to the VRA.

"Hispanic fear of anti-Spanish backlash" [53a], including a reference to an affidavit listing some unspecified number of instances of language-based discrimination against Hispanics.

Significantly, the court did not point to any evidence that these fears were substantially justified. One is left to speculate about how wide-spread this pattern of discrimination was, whether instances of discrimination were redressed promptly when identified, whether discrimination had any measurable impact on the electoral process, and whether it was sufficiently widespread and significant to justify the invalidation of a plan creating nine Hispanic seats in favor of

an even heavier electoral tilt towards Hispanics.[7]

Discrimination is relevant to VRA analysis not because in the manner of original sin it taints a jurisdiction forever. Rather, it should be significant if, and only if, the lingering effects of prior discrimination have a current adverse impact on the ability of minority groups to effectively exercise political power. *See* S.Rep. at 33, 1982 U.S. Code, Cong. and Admin. News at 211. The District Court, however, made no findings tying the existence of prior or current anti-Hispanic discrimination in Dade County to the present inability of that community to presently exercise effective

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7. As further evidence of discrimination, the District Court also pointed to the fact that several counties in Florida were subject to Justice Department preclearance. Significantly, Dade County, whose districting was at issue in this case, was not one of those counties.

political power. Instead it conferred almost talismanic effect on the existence of anti-Hispanic discrimination standing alone.

Equally significant are those factors the District Court did not address. It did not discuss whether there were structural barriers to full and effective minority (Hispanic) participation, such as unusually large districts or a candidate slating process controlled by the white majority. The court below likewise wholly failed to consider whether non-Hispanic office-holders were responsive to Hispanic concerns. It did not inquire whether the invalidated legislative plan served other important governmental interests, including facilitating other groups to exercise effective political power.

These omissions are not mere oversights. Consideration of these

factors would have led the court to consider factors beyond the raw number of majority Hispanic districts. Instead, the District Court would have been forced to look to all the political realities of Dade County, and to have given consideration to other, competing, legitimate political interests.

## CONCLUSION

In its earliest encounter with the Voting Rights Act, this Court termed the Act's provisions "stringent remedies." *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Like most strong medicine, the Act must be used with care. So used, the VRA will cure the lingering effects of electoral discrimination. Improperly used, the Act can perpetuate racial division at the polls by making race the

overriding factor in drawing district lines, to the exclusion of all others.

So applied, the VRA will become a self-fulfilling prophecy of racial and ethnic politics, of increased racial and ethnic parochialism. Candidates will vie to establish that they, not their opponents, will be more loyal to the parochial interests of the district's dominant racial group, be it minority (*i.e.* Black or Hispanic) or white, secure in the knowledge that the VRA endorses that brand of politics. Perhaps some believe that to be the case, but it appears at odds with the Congressional language and intent.

It can hardly be the case that the Congress which passed the Voting Rights Act in 1965 or adopted the Voting Rights Act Amendments of 1982 meant to encourage the racist politics of a David Duke or Gus

Savage by permanently making race and ethnicity the central feature of every legislative district in the country. *See A White Racist's Dream Candidate*, Chicago Tribune (March 22, 1990) (editorial criticizing soon-to-be former Congressman Gus Savage's racist appeals in his majority Black district). Nor should it be too easily inferred that Congress expressed a preference for parochial enclaves over fluid, multi-ethnic districts.

In her *Gingles* concurrence, Justice O'Connor commented on the difficulty in enforcing both an 'effects' test with teeth and a ban on proportional representation. "[T]here [is] an inherent tension between what Congress wished to do and what it wished to avoid." 478 U.S. at 84. *Thornburg* v. *Gingles* did not finally resolve that tension.

This case illustrates the importance of keeping both sides of the Congressional compromise in view -- something we believe the District Court, with its sole focus on maximizing minority political power -- did not do. In any event, the importance of the questions presented merit plenary review so that other courts, and more important, governmental bodies charged by law with redistricting, know what the VRA requires of them.

Respectfully Submitted,

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